DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,312

In re: 2400 16th Street, N.W.

Ward One (1)

ENVOY ASSOCIATES LIMITED PARTNERSHIP
Housing Provider/Appellant/Cross Appellee

v.

2400 TENANT ASSOCIATION
Tenant/Appellee/Cross Appellant

DECISION AND ORDER

June 30, 2008

YOUNG, CHAIRMAN. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodation and Conversion Division (RACD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal regulations (DCMR), 14 DCMR §§ 3800-4399 (2004), govern the proceedings.

I. PROCEDURAL HISTORY

On September 28, 2001, the 2400 Tenant Association filed Tenant Petition (TP) 27,312 with the RACD. The tenants alleged that rent increases taken by the housing provider, Envoy Associates Limited Partnership, were larger than the increases allowed by the Act. Hearing Examiner, Gerald Roper convened the RACD hearing on November

19, 2002. Neither the tenants nor a representative of the tenant association appeared at the hearing. Housing providers Anna Royster, Timothy Taylor, and counsel for the housing provider, Vincent Policy Esquire, were present at the hearing. The hearing examiner noted that notice of the hearing was sent to all parties by United States Postal Service (USPS) Priority Mail. Further, the notice was also sent to Dorothy Kemp, president of the 2400 Tenant Association, on October 24, 2002. The hearing examiner noted that USPS Delivery Confirmation Receipt, number 0302-0980-0003-5793-3633 shows that the notice was delivered at 10:37 AM on October 25, 2002 at 2400-16th Street, N.W. Apt 627, the address and apartment number of Dorothy Kemp. 2400 Tenant Ass'n v. Envoy Assoc. Ltd. P'ship, TP 27,312 (RACD Nov. 22, 2002) at 2. On the day of the hearing, November 19, 2002, the hearing examiner waited thirty (30) minutes for the tenants and/or their representative to appear at the hearing. After waiting thirty (30) minutes for the tenants to appear, counsel for the housing provider moved to have the case dismissed with prejudice. Hearing Examiner Roper stated that he would grant the housing provider's motion to dismiss the case with prejudice for failure to appear. In the November 22, 2002, decision, and contrary to his statement on the record at the hearing, the hearing examiner dismissed the petition without prejudice. Id.

On December 12, 2002, the housing provider filed a notice of appeal with the Commission asserting that Hearing Examiner Roper erred by not dismissing the case with prejudice. On April 11, 2003, the Commission held a hearing on the housing provider's appeal from the November 22, 2002 decision and order.

The Commission issued its decision and order on July 15, 2004. In its decision the Commission noted that the hearing examiner's decision did not contain findings of

facts and conclusions of law. The Commission held that pursuant to D.C. OFFICIAL CODE §2-509(e) (2001), the Commission, absent findings of fact and conclusions of law, cannot review the record because it cannot determine whether the hearing examiner's decision and order was "supported by and in accordance with the reliable, probative, and substantial evidence." Envoy Assoc. Ltd. P'ship v. 2400 Tenant Ass'n, TP 27,312 (RHC July 15, 2004) at 5-6. As a result, the Commission remanded the November 22, 2002 decision and order to the hearing examiner to make findings of fact and conclusions of law on the dismissal and whether prejudice attaches. Id.

On May 4, 2005, the hearing examiner issued his remand decision and order. In his decision, the hearing examiner made the following findings of fact:

1. TP 27,312 was filed with the RACD on September 28, 2001 by the Petitioner, 2400 Tenant Association.

2. TP 27,312 was scheduled for a hearing on November 19, 2002, which convened on that date.

3. Notice of the date, time and place the hearing was furnished to the parties in accordance with D.C. OFFICIAL CODE §§ 42-3502.16(c) (2001).

4. The U.S. Postal Service Delivery Confirmation Receipt, number 0302-0980-0003-5793-3633, shows that the notice of the hearing was delivered at 10:37 am on October 25, 2002 at 2400 16th Street, N.W., Apt. 627.

5. The record reflects that Petitioner, 2400 Tenant Association, did not appear at the November 19, 2002 hearing.

6. Petitioner's representative, Dorothy Kemp, filed a request for continuance with the RACD on November 13, 2002, five days prior to the hearing date of November 19, 2002.

7. Counsel for the Respondent, in the absence of the Petitioner, moved to dismiss TP 27,312 with prejudice for failure of the Petitioner to prosecute.

2400 Tenant Ass'n v. Envoy Assoc. Ltd. P'ship, TP 27,312 (RACD May 4, 2005). The hearing examiner concluded as a matter of law:

> The Petitioners filed with the RACD a timely request for continuance in accordance with 14 DCMR 4014.1 and set forth good and sufficient cause for the relief sought in accordance with 14 DCMR 4014.3. Accordingly, this Tenant Petition/Complaint shall be dismissed without prejudice.

Id. at 4. On May 11, 2005, the housing provider filed a timely appeal of the remand decision. On May 23, 2005, the tenant association filed a cross-appeal in the Commission of the remand decision and order. The Commission held its appellate hearing on July 13, 2005.

II. HOUSING PROVIDER'S ISSUES

The housing provider raised the following issues in its May 11, 2005 notice of appeal:

1. The Hearing Examiner erred by dismissing the Tenant Petition without prejudice. The Tenant Petition was required to be dismissed with prejudice. The dismissal without prejudice was contrary to the statute, arbitrary and capricious and without substantial evidence in the record of these proceedings.

2. The Decision and Order is arbitrary and capricious and not supported by substantial evidence in the record of these proceedings, in that on page 2 thereof it states that the Tenant's motion for continuance was untimely and did not state a cognizable ground for a continuance, whereas on page 3 and 4 thereof the Hearing Examiner stated that the request for a continuance was timely (which it was not) and did state a cognizable ground for continuance.

3. Finding of Fact No. 6 and the Conclusions of Law are arbitrary and capricious and not supported by substantial evidence in the record of these proceedings.

Notice of Appeal at 1.

III. DISCUSSION OF HOUSING PROVIDER'S ISSUES

A. Whether the Hearing Examiner erred by dismissing the Tenant Petition without prejudice when doing so was contrary to the statute, arbitrary and capricious and without substantial evidence in the record of these proceedings.

The housing provider argues that the hearing examiner dismissed the tenant association's petition without prejudice despite substantial evidence in the record requiring that the petition be dismissed with prejudice.

In Washington Realty Co. v. 3030 30th St. Tenant Ass'n, TP 20,749 (RHC Jan. 30, 1991), the Commission articulated the "substantial evidence" test. The test states that a decision is supported by substantial evidence where, (1) each contested issue is addressed in the findings of fact; (2) conclusions rationally flow from such facts; and (3) sufficient evidence supports each finding. Id. cited in Ryan v. Carmel Partners, TP 28,367 (RHC Sept. 27, 2007).

The hearing examiner must make findings of facts and conclusions of law that are consistent with one another. Lack of consistency is a sufficient ground for a case to be remanded. See Columbia Realty Venture v. District of Columbia Rental Hous. Comm'n, 573 A.2d 362 (D.C. 1990) (where the court remanded for clarification of findings of fact which were irreconcilable); Norwood v. Peters, TP 27,768 (RHC June 14, 2006) (finding the hearing examiner's inconsistent finding of facts and conclusion of law were grounds for the case to be remanded for further clarification and a consistent ruling).

In the instant case, the hearing examiner made contradictory findings and conclusions of law. First, he stated that the petitioners filed an "untimely request for continuance dated November 13, 2002, which did not reach the Examiner until after the scheduled hearing on November 19, 2002." Further, the hearing examiner noted that the "[T]enant Association's request failed to meet the criteria for granting a continuance as set forth in 14 DCMR 4014 and would have been denied." However, the hearing examiner dismissed the case without prejudice because "the Petitioner's did make an

attempt to contact the office and this case has been in the system for over a year." 2400 Tenant Assoc., TP 27,312 (RACD May 4, 2005) at 2-3. The Commission notes that the hearing examiner stated that the tenant association made an attempt to contact the RACD seeking a continuance. The hearing examiner cited their "attempt" as grounds to dismiss the Tenant Petition without prejudice. The Commission notes that the hearing examiner's contradictory conclusion of law and findings of facts resulted in an erroneous decision inconsistent with Commission regulations and prior precedent. Rather than remand this issue back to the hearing examiner, the Commission reverses the hearing examiner's finding of fact and conclusion of law on this issue because the hearing examiner erred by failing to apply 14 DCMR § 4014.3 (2004) after he determined that the Tenant Petition was filed in an untimely manner.

B. Whether the hearing examiner erred when he dismissed the Tenant Petition without prejudice in contradiction of his determination that the Motion for Continuance was untimely filed and failed to state a cognizable ground for continuance.

The housing provider argues that the hearing examiner erred, first, when he failed to dismiss the tenant petition because a motion for continuance of the RACD hearing was untimely filed (see Discussion, supra). Secondly, the housing provider argues that the motion failed to state a cognizable ground for granting a continuance.

After erroneously finding that the tenant association filed a timely motion for continuance, he determined that the continuance was for "good cause," that is, to permit the tenants an opportunity to employ new counsel. The hearing examiner dismissed the petition without prejudice relying on 14 DCMR § 4014.3 (2004), which states:

> Conflicting engagements of counsel, absence of counsel, or the employment of new counsel shall not be regarded as good cause for continuance unless set forth promptly after notice of the hearing has been given.

The Commission has previously held, in circumstances similar to the instant case, that a petition must be dismissed with prejudice in the absence of good cause. The Commission in determining the procedure to substantiate good cause stated:

> In review, we seek to determine if good cause exists to justify a dismissal without prejudice. If the record does not contain sufficient facts and circumstance to constitute good cause why prejudice should not attach, the Examiner's dismissal on petitioner's default must be with prejudice.

Wayne Gardens Tenant Assoc. v. H & M Enter., TP 11,845 (RHC Sept. 27, 1985). In the present case, hearing examiner Roper dismissed TP 27,312 without prejudice in his May 4, 2005 decision and order finding that "good cause" existed. In Wayne Gardens, the Commission emphasized that the burden falls on the petitioner to show that good cause existed to justify that prejudice should not attach to the case. TP 11,845 at 3. See Rosenboro v. Askin, TP 3991 & 4673 (RHC Feb. 26, 1993) (finding that the petitioner must carry the burden of proving his or her entitlement to the relief requested....if the petitioner fails to put sufficient competent evidence in the record to support the claim, the petition should be dismissed with prejudice).

Contrary to the hearing examiner's finding, the Commission concludes that the tenant association filed an untimely motion to continue the hearing, because it failed to do so promptly, as required by 14 DCMR § 4014.3 (2004). Further, pursuant to 14 DCMR § 4014.3, the Association set forth a reason, employment of new counsel, which was not regarded as good cause for granting a continuance. Therefore, the hearing examiner erred when he found that the tenants merited the "good cause" exception to the rule. Accordingly, the hearing examiner's decision on this issue is reversed.

C. Whether Finding of Fact No. 6 and the Conclusions of Law are arbitrary and capricious and not supported by substantial evidence in the record of these proceedings.

The hearing examiner's decision at findings of fact numbered six (6) states:

> 6. Petitioner's representative, Dorothy Kemp, filed a request for continuance with RACD on November 13, 2002, five days prior to the hearing date of November 19, 2002.

2400 Tenant Ass'n v. Envoy Assoc. Ltd. P'ship, TP 27,312 (RACD May 4, 2005). The evidence of record reflects that the tenant association's motion for continuance was filed on November 13, 2002 to continue the hearing which was scheduled for November 19, 2002. Pursuant to 14 DCMR §§ 4008.6, 4014 (2004), a party may file a motion to continue or reschedule a hearing for good cause if the motion is filed at least five (5) business days prior to the hearing date.

In the instant case, the tenant association filed its motion for continuance on Wednesday, November 13, 2002 and the hearing was scheduled for Thursday, November 19, 2002. Consequently, there were only four (4) business days between the date of filing and the date of the hearing, Thursday, November 14; Friday, November 15; and Monday, November 18, 2002. Therefore the tenant association failed to file the motion for continuance in a timely manner. The record reflects that the tenant association filed their motion for continuance four (4) days before the hearing rather than the required five (5) days. Therefore, the hearing examiner's computation of time was the result of miscalculation and erroneous.

The standard of review applied by the Commission in a decision issued by the Rent Administrator is stated in D.C. OFFICIAL CODE § 42-3502.16(h) (2001), which provides:

> The Rental Housing Commission may reverse, in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of this chapter, or unsupported by substantial evidence on the record of the proceedings before the Rent

Administrator, or it may affirm, in whole or in part, the Rent Administrator's decision.

The evidence of record reflects that the tenants' Motion for Continuance was filed only four (4) business days before the hearing. Accordingly, the appeal of this issue is granted, and the hearing examiner's finding of fact numbered six (6) is reversed.

IV. TENANTS' ISSUE ON APPEAL

The tenant association filed their notice of appeal on May 23, 2005 to the Rent Administrator's decision and order of May 4, 2005. In the notice of appeal the tenant association stated:

> The Examiner concluded after careful evaluation of the evidence and findings of fact [sic] the 2400 Tenant Association filed with the RACD a timely request for continuance in accordance with 14 DCMR §§ 4014.1 and set forth good and sufficient cause for the relief sought in accordance with 14 DCMR §§ 4014.3 accordingly, this Tenant Petition Complaint shall be dismissed without prejudice. The 2400 Tenant Association is prepare [sic] to go forward with TP 27,312. Wherefore 2400 Tenant Association prays that the Rent Administrator's decision and order be remanded.

V. DISCUSSION OF THE TENANTS' ISSUE

The Commission's regulation regarding the initiation of appeals, 14 DCMR § 3802.5(b) (2004), provides:

> The notice of appeal shall contain the following:
>
> (b) The Rental Housing Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator. (emphasis added).

In the instant case, the tenant association failed to provide a clear and concise statement of the hearing examiner's alleged errors in his May 4, 2005 decision and order. See Mersha v. Town Ctr Ltd. P'ship, TP 24,970 (RHC Oct. 10, 2001); Gardiner v. Charles C. Davis Real Mgmt. Realty, TP 24, 955 (RHC May 11, 2001) (finding that a notice of

appeal that simply states that the appellant is taking an appeal, modeled after the requirements of Federal Rules of Appellate Procedure, does not meet the requirements of the Commission's rules and must be dismissed); Sanders v. Keyes, TP 12,127 (RHC Apr. 30, 1998); Tenants of 1755 N St., N.W. v. N St. Follies Ltd. P'ship, HP 20,746 (Apr. 30, 1998). Therefore, the tenant's cross appeal is dismissed for failure to follow proper procedure as required in 14 DCMR § 3802.5 (b) (2004).

VI. CONCLUSION

For the foregoing reasons, the May 5, 2005, decision of the hearing examiner dismissing TP 27,312 without prejudice is REVERSED. Accordingly, TP 27,312 is DISMISSED with prejudice.

SO ORDERED.

RONALD A. YOUNG, CHAIRMAN

DONATA L. EDWARDS, COMMISSIONER

PETER SZEGEDY-MASZAK, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission … may seek judicial review of the decision … by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of

Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The Court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,312 was mailed by priority mail, with confirmation of delivery, postage prepaid this **30th** day of **June, 2008**, to:

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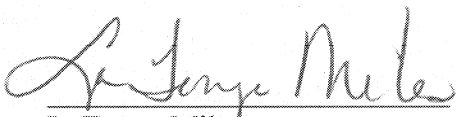

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